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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940

No. 470

R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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**BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

To the Honorable Supreme Court of the United States:

The Respondent in the above proceedings, Electrical Supply Company, respectfully presents this brief in opposition to the petition for a writ of certiorari, filed herein, and in reply to Petitioner's brief in support thereof.

OPINIONS BELOW

The opinion of the District Court (R. 217) was not reported.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 281) is reported in 112 F. 2d. 150.

The opinion of the Circuit Court of Appeals for the Fifth Circuit denying the motion for a rehearing (R. 295) is not reported.

ARGUMENT

At the outset, it is respectfully submitted that this is not a matter in which sound judicial discretion would warrant a review on writ of certiorari, as there are neither special nor important reasons for the granting of the petition.

Petitioner says, on page five of the petition, that the decision of the Circuit Court of Appeals for the Fifth Circuit has created a conflict with decisions of this Honorable Court and with the decisions of the Courts of Appeals for other circuits. However, it is not only respectfully submitted that even a superficial examination will show that the decision sought to be reviewed is in absolute accord with the decisions of this Honorable Court on the subject, as well as with the decisions in all of the circuits where the point has been decided; but even the Heard Act, which is the statute involved in the case, has been, as your Honors are well aware, superseded by the Act of August 24, 1935, c. 642 (Public No. 321, 49 Stat. 793) so that even if there were a conflict of decisions, which is denied, there would certainly be no reason of public interest which would warrant a review of this case on a writ of certiorari. In fact, the petition here filed involves nothing but the usual, and always-to-be-expected, dissatisfaction of a defeated litigant.

It is, therefore, respectfully submitted that there is nothing here involved which would warrant taking the time of this Honorable Court to review the decision which the Petitioner finds so distasteful.

RULES NOT COMPLIED WITH

Be that as it may, however, we respectfully submit that, in filing its petition for a writ of certiorari, the

Petitioner has not complied with the Rules of this Honorable Court, as Rule 38-(2), adopted February 13, 1939, effective February 27, 1939, relating to writs of certiorari, provides, in part, as follows:

"(2) The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition."

It will be noted that, according to this Rule 38-(2), a petition for certiorari must contain not only a statement of the matter involved and the reasons relied on for the allowance of the writ, but also (1) the questions presented and (2) a jurisdictional statement.

Even should it be conceded that the next to the last paragraph on page three of the petition is a sufficient statement of the questions presented (and that may be doubted) it is apparent that the petition does not even attempt to set forth a jurisdictional statement. On the contrary, no jurisdictional statement is to be found except in the brief (pp. 7-8); but the brief is not a part of the petition. *General Talking Pictures Corporation v. Western Electric Company*, 304 U. S. 175, 178.

It would appear, therefore, that the petition in the instant case was drawn without any consideration being given to the revision of the Rules of this Honorable Court

in 1939, for, prior to such revision, Rule 38-(2) merely required that the petition contain a statement of the matter involved and the reasons relied on for the allowance of the writ. This is all that is contained in the petition now under consideration, and we respectfully submit, therefore, that the failure of Petitioner to comply with the requirements of Rule 38-(2), as amended in 1939, "will be a sufficient reason for denying the petition".

NO MERIT IN PETITION

However, even if this Honorable Court gives further consideration to the petition, we respectfully submit that there is no merit in it and that it should be denied.

On the second page of the petition, it is stated that there is no dispute as to any fact bearing upon the date of final settlement. This, of course, is perfectly true, because, in this case, the date of final settlement was a question of law and not of fact; but it is not stated until practically the end of the brief (p. 20) that there was a serious dispute as to which document constituted final settlement under the Heard Act.

On the second and third pages of the petition, there is a partial quotation from a certain letter (R. 38) dated July 2, 1932, which Petitioner asserts constituted "final settlement", and on the third page of the petition there is a rather cursory reference to a letter (R. 51) dated July 28, 1934, in which letter Petitioner says the Director of Procurement reviewed and checked the record.

It is this letter (R. 51) dated July 28, 1934, which we contend constituted "final settlement", and, of course, your Honors are aware that the office of Director of Procurement (to be the head of the Procurement Division, to which division the office of the Supervising Architect

of the Treasury Department was transferred) was created by an executive order issued by President Roosevelt, under date of June 10, 1933, under and pursuant to Section 16 of Title II of the Act of March 3, 1933, c. 212 (Public No. 428, 47 Stat. 1489, 1517).

In fact, we are so strongly of the opinion, that, in order to determine the date of "final settlement", it is only necessary to read said letters of July 2, 1932 and July 28, 1934, side by side, that we have taken the liberty of printing them (with certain words emphasized by us) as a part of this brief; and your Honors will find them on the following insert pages.

(R. 38)

TREASURY DEPARTMENT
WASHINGTON

July 2, 1932.

R. P. Farnsworth & Co.,
925 Maritime Building,
New Orleans, Louisiana.
Gentlemen:

In connection with your first contract at the New Orleans, La., Marine Hospital, for the construction of main building, etc., reference is made to your letter of June 21, 1932, requesting payment on account of \$4,250, **pending final settlement of the contract**, which is held up by the necessity of referring to the Comptroller General the question of piling, for which you ask additional compensation.

The building was occupied prior to the expiration of your contract time on Jan. 2, 1932. There remained for correction, after the District Engineer's final report of Nov. 14, 1932, a number of minor items which the records indicate were completed by you without loss or inconvenience to the Government. There is a balance due you under this contract of \$4,332.80. You will be paid at this time on account of your said contract the sum of \$4,250.00, the balance retained (\$82.80), being considered sufficient to protect the Government's interests **pending final settlement of your contract**.

Payment will be made from the appropriation "Marine Hospital, New Orleans, La.".

This modification of your contract is made upon the express condition that it is subject generally to all the contract stipulations and covenants; that it is without prejudice to any and all rights of the United States under your contract and bond; and that you shall first furnish the formal consent of your surety to the said modification, a form for which consent will be forwarded under separate cover for prompt execution and return here.

Respectfully,

(Signed) Ferry K. Heath,
Assistant Secretary of the Treasury.

(R. 51)

TREASURY DEPARTMENT
WASHINGTON

July 28, 1934.

Procurement Division
Public Works Branch
The Honorable,

The Secretary of the Treasury.

Sir:

The following report and recommendation are submitted relative to the contract with R. P. Farnsworth and Company, Inc., of New Orleans, Louisiana, for construction of the Marine Hospital, New Orleans, Louisiana:

Date of contract _____ June 28, 1930.

Time for completion, as extended _____ 547 days from
July 11, 1930

Liquidated damages for delay _____ \$100.00 per day.

Amount of contract as
originally awarded _____ \$1,178,000.00

Additions, from time to time _____ 34,251.88

\$1,212,251.88

Deductions, from time to time _____ 3,027.14

\$1,209,224.74

Payments on account _____ 1,209,141.94

Balance _____ \$ 82.80

The time for completion of this contract as extended, expired on January 9, 1932.

A review of the records relative to the contract indicates that the work was satisfactorily completed by December 3, 1931, with the exception of certain defects and omissions. These items were corrected or supplied by February 24, 1932, and being minor in character, the delay in completion of same did not interfere with the activities in the buildings or cause any loss or inconvenience to the Government. Subsequently, certain other minor defects developed in the work, which were adjusted by June 2, 1932.

Final settlement of this contract has been withheld pending the replacement of a section of brick wall by the contractors. This section of wall was removed for a driveway and was not replaced until September 15, 1933 after the contractors had completed two other contracts at the Hospital. **There is also pending the matter of an additional bond** which the contractors were requested to furnish due to the fact that the original Surety on their bond was deemed no longer sufficient security, but the bond has not been received.

In view of the fact that there was no delay in actual completion of the work and that the apparent delay in final completion of the contract due to the correction of defects and omissions, caused no loss or inconvenience to the Government, **it is recommended that liquidated damages be waived** and authority be given for the payment of the balance due, viz., \$82.80, from the appropriation, "Marine Hospital, New Orleans, Louisiana".

It is further recommended in view of the fact that no additional bond has been obtained, that the contract be referred to the Comptroller General of the United States for direct payment.

Respectfully,

C. J. Peoples

Director of Procurement.

**APPROVED, DAMAGES
WAIVED, AND CONTRACT
REFERRED TO COMPTROLLER
GENERAL FOR DIRECT PAY-
MENT.**

JULY 28, 1934.

H. Morgenthau, Jr.

Secretary of the Treasury.

Your Honors will see instantly that the letter of July 2, 1932 did not even purport to be a "final settlement", but was specifically written as a "modification" of Petitioner's contract, without prejudice to any and all rights of the United States under Petitioner's contract and bond, and subject to Petitioner first furnishing the formal consent of its surety to said modification, which formal consent (R. 36) was in fact furnished before the payment was made. Moreover, in two places, the letter said that the modification of the contract was being made "pending final settlement," so we find it very hard to understand how anyone could construe said letter as "final settlement" under the Heard Act.

On the contrary, your Honors will find that the letter of July 28, 1934 (R. 51) specifically stated that, up to that time, "final settlement" of the contract had been withheld, and, on said 28th day of July, 1934, for the first time, liquidated damages were waived and authority given for the "final settlement" of the contract.

It is respectfully submitted that counsel for the Petitioner has permitted the small amount withheld in this case, namely, \$82.80, to obstruct his view of the legal principles involved; and, with all due deference to the opinion of Judge McCord, we respectfully submit that the decision sought to be reviewed is in absolute agreement with the decisions of this Honorable Court on the subject, and with the decisions of all of the Circuit Courts of Appeals where the subject has been considered; and that, therefore, the petition for a writ of certiorari should be denied.

CASES RELIED ON

As a matter of fact, counsel for both sides relied, in the District Court and in the Circuit Court of Appeals

for the Fifth Circuit, on exactly the same authorities, namely, the opinions of this Honorable Court in the *Peeler* case, 240 U. S. 214, and in the *Globe Indemnity Company* case, 291 U. S. 476, as well as on a large number of cases decided in the various circuits, the only conflict which then existed, or which now exists, being in the fact that our learned opponent says that the decision below was contrary to the above mentioned cases, whereas we contend that the decision below is in absolute accord with them.

It is therefore respectfully submitted that there is absolutely no warrant in this case for the exercise by this Honorable Court of its supervisory authority, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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